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No. 03-1052

Supreme Court, U.S.
FILED
MAR 26 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GLENDALE UNIFIED HIGH SCHOOL DISTRICT NO. 205 OF MARICOPA COUNTY,

Petitioner,

vs.

SHELLEY SAVAGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should overrule longstanding precedent holding political subdivisions of the state are not entitled to Eleventh Amendment immunity from suit when the state treasury has no legal or practical liability for a money judgment against the political subdivision; and the political subdivision performs a local governmental function.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully requests this Court deny the Petition for a Writ of Certiorari seeking review of a decision by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-29, is reported at *Savage v. Glendale Unified High School Dist. No. 205 of Maricopa Co.*, 343 F.3d 1036 (9th Cir. 2003). The ruling of the district court, Pet. App. 30-59, is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its opinion on September 10, 2003. Petitioner filed a Petition for Rehearing with a suggestion for rehearing en banc, both of which were denied. The petition for a Writ of Certiorari was filed on January 19, 2004. This Court's jurisdiction has been invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

> the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI.

STATEMENT OF THE CASE

This case arises out of the termination of plaintiff Shelley Savage's employment relationship with defendant Glendale Union High School District ("the School District" or "GUHSD"). Shelley Savage, a disabled individual, was employed by the School District at Independence High School as an education services technician. The management at the high school informed Savage that she must affix a flagpole to her wheelchair in order to make herself more visible to students in the classroom. She objected to the request, informing the management staff she believed it to be discriminatory. Nevertheless, they continued to require that she comply. When Savage refused to put the flag and flagpole on her wheelchair, the School District terminated her employment. Savage subsequently filed a discrimination charge with the United States Equal Employment Opportunity Commission ("EEOC") and the Arizona Civil Rights Section of the Attorney General's office. The EEOC issued a determination letter, finding reasonable cause to believe that the School District had discriminated against Savage by subjecting her to discriminatory terms and conditions of employment, and then discharging her in retaliation for her opposition to the discriminatory terms. The EEOC then issued Savage a right to sue letter. Savage also received a right to sue letter from the Arizona Civil Rights Section of the Attorney General's office.

Savage filed suit in the United States District Court for the District of Arizona, claiming violations of Title I of the ADA, 42 U.S.C. §§ 12101 *et seq.*, 42 U.S.C. § 12203, Section 504 of the RA, 29 U.S.C. § 794, and the Arizona Civil Rights Act ("ACRA"), Ariz. Rev. Stat. §§ 41-1461 *et seq.* Savage seeks injunctive, compensatory and punitive relief.

The School District filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) arguing that Savage's claims under the ADA and RA are barred by the Eleventh Amendment because the School District is an arm of the state. The School District further argued that if the ADA claims and RA claims are dismissed, then the district court could not exercise supplemental jurisdiction over the ACRA claims. Both parties supplied affidavits and public documents in support of their positions regarding the motion to dismiss. After reviewing the arguments and documentation and applying the five part test set out in *Mitchell v. Los Angeles Community College District,* 861 F.2d 198, 201 (9th Cir. 1988), the district court concluded that the School District was not an arm of the state and therefore not entitled to sovereign immunity under the Eleventh Amendment. Because the district court determined that it had jurisdiction over the ADA and RA claims, it concluded that the exercise of jurisdiction over the ACRA claims was a proper exercise of supplemental jurisdiction and declined to dismiss them.

The School District filed an appeal with the Court of Appeals for the Ninth Circuit arguing that the ADA claims and RA claims are barred by the Eleventh Amendment. The question on appeal was whether an Arizona high school district was an arm of the state entitled to Eleventh

Amendment immunity from suit in federal court for alleged violations of the ADA and RA. The parties briefed the issue. The Arizona Education Association and the National Protection and Advocacy agency submitted amicus briefs on behalf of the Plaintiff. The Arizona School Board Association submitted an amicus brief on behalf of the Defendant GUHSD. The Ninth Circuit heard the oral argument of the parties. Applying the *Mitchell* factors, a panel of the Ninth Circuit unanimously held that an Arizona high school district is not an arm of the state for Eleventh Amendment immunity purposes.

REASONS FOR DENYING THE PETITION

I. This Court Should Deny Petitioner's Petition For A Writ Of Certiorari Review Because This Case Possesses None Of The Customarily Compelling Reasons, Which Warrant The Attention Of This Court.[1]

A. The Ninth Circuit applied this Court's well-established jurisprudence regarding Eleventh Amendment immunity in a manner consistent with this Court's prior decisions. This Court's longstanding precedent has established that political subdivisions of the state (counties,

[1] Traditionally, this Court has also granted certiorari review when a federal question is answered by a state court of last resort in conflict with another state court of last resort or a federal court of appeals. *See e.g., Baldwin v. Alabama,* 472 U.S. 372, 374 (1985); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 753 n.1 (1985). The instant case, however, was filed in federal district court and does not arise from a state court. As this case created no such conflict that warrants this Court's attention, Respondent does not discuss this factor.

municipal corporations and entities such as school districts that resemble counties and municipal corporations) are not entitled to Eleventh Amendment immunity. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 n.34 (1984); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) ("the Eleventh Amendment does not extend its immunity to units of local governments"). In contrast, arms of the state (state entities that are so much a part of the state that they are entitled to the sovereignty of the state itself) are immune.

This precedent, dating back more than 110 years, establishes that the Eleventh Amendment only serves to immunize state governments, not local entities. *Luning*, 133 U.S. at 530; *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) ("consistently [this Court has] refused to construe the [Eleventh] Amendment to afford protection to political subdivisions . . . even though such entities exercise a 'slice of state power'"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 35 (1994) ("Political subdivisions exist solely at the whim and behest of their State, yet cities and counties do not enjoy Eleventh Amendment immunity.").

Although determining an entity's status is a question of federal law, that determination can only be made after considering the provisions of state law that define the entity's character. *Regents of the University of California v. Doe*, 519 U.S. 425, 430 (1997); *Mt. Healthy*, 429 U.S. at 280. Writing for the Court, Chief Justice Rehnquist concluded the following factors were significant in determining Ohio school districts were not an arm of the state. Ohio

school districts are defined as political subdivisions in state law, have extensive powers to bond and levy taxes, and are one of many local school boards. Thus, even though the state gave a significant amount of money to the school district and exercised guidance over the districts, this Court found that Ohio school districts were not entitled to assert Eleventh Amendment immunity as they were more like a county or city than an arm of the state. *Mt. Healthy,* 429 U.S. at 280.

Since *Mt. Healthy*, the Ninth Circuit adopted a five factor test to determine whether an entity is an arm of the state. *See Mitchell,* 861 F.2d 198. In this case, the Ninth Circuit concluded that an Arizona high school district was not an arm of the state after examining the five *Mitchell* factors: 1) whether a money judgment would be satisfied out of state funds; 2) whether the entity performs central governmental functions; 3) whether the entity may sue or be sued; 4) whether the entity has the power to take property in its own name or only the name of the state; and 5) the nature of the corporate status of the entity. *Mitchell,* 861 F.2d at 201.

The Ninth Circuit's application of the *Mitchell* factors in this case is consistent with *Mt. Healthy* and intervening authority from this Court. The Ninth Circuit correctly applied the first *Mitchell* factor – whether a judgment will affect the state treasury – as it has been clarified by this Court to mean whether the state is legally or practically liable for a monetary judgment against the entity. *Doe,* 519 U.S. at 430-31 (" . . . it is the entity's potential legal liability . . . that is relevant."); *Hess*, 513 U.S. at 51 ("If the expenditures of the enterprise exceed receipts, is the state obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is 'No' – both legally and

practically – then the Eleventh Amendment's core concern is not implicated."). The Ninth Circuit analyzed the four remaining factors so as to determine that the dignity of the sovereign State of Arizona was not affected by a suit against the Arizona high school district. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996); *Hess*, 513 U.S. at 40-41.

The Ninth Circuit's analysis of Arizona school districts does not depart from this Court's well-established precedent. Since this Court held in *Mt. Healthy* that an Ohio school board was not an arm of the state entitled to Eleventh Amendment immunity, most courts of appeals have, after a review of state law, held that the school districts or boards in their jurisdiction were local governmental units and not arms of the state.[2] *See Holz v. Nenana City Public School District,* 347 F.3d 1176, 1189 (9th Cir. 2003) (Alaska); *Eason v. Clark County Sch. Dist.,* 303 F.3d 1137 (9th Cir. 2002) (Nevada); *Cuesta v. Sch. Bd. of Miami-Dade County*, 285 F.3d 962, 966 (11th Cir. 2002) (Florida); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001) (North Carolina); *Duke v. Grady Mun. Sch.*, 127 F.3d 972 (10th Cir. 1997) (New Mexico); *Ambus v. Granite*

[2] All circuits apply a variety of factors, all of which are consistent with *Mt. Healthy*, in determining whether an entity is an arm of the state. The various factors examine how state law created and treats the entity in question. Compare the Ninth Circuit's *Mitchell* factors to the Tenth Circuit two factor test: "The court first examines the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state. Second, the court examines the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing." *Duke,* 127 F.3d at 974, citing *Watson v. University of Utah Med. Ctr.,* 75 F.3d 569, 574-75 (10th Cir. 1993).

Bd. of Educ., 995 F.2d 992 (10th Cir. 1993) (Utah); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509-11 (11th Cir. 1990) (Alabama); *Lester H. v. Glthool*, 916 F.2d 865, 870-71 (3rd Cir. 1990) (Pennsylvania); *Rosa R. v. Connelly*, 889 F.2d 435, 437-38 (2nd Cir. 1989) (Connecticut); *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 353 (5th Cir. 1987) (Texas) (citing *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1112 (5th Cir. 1980)), overruled on another ground by *Walton v. Alexandar*, 44 F.3d 1297 (5th Cir. 1995); *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 27 (2nd Cir. 1986) (New York); *Minton v. St. Bernard Sch. Bd.*, 803 F.2d 129, 131-32 (5th Cir. 1986) (Louisiana); *Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986) (Illinois); *Stoddard v. Sch. Dist. No. 1, Lincoln County*, 590 F.2d 829 (10th Cir. 1979) (Wyoming); *Unified Sch. Dist. No. 480 v. Epperson*, 583 F.2d 1118, 1121-23 (10th Cir. 1978) (Kansas); *Adams v. Rankin County Bd. of Educ.*, 524 F.2d 928, 929 (5th Cir. 1975) (Mississippi). But *see Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992) (California); *De Levay v. Richmond County Sch. Bd.*, 284 F.2d 340 (4th Cir. 1960) (Virginia).

B. There is no conflict that exists between federal circuit courts regarding applicability of Eleventh Amendment immunity. Petitioner misrepresents that this case has created a circuit split between the Ninth and Tenth Circuit Courts of Appeals, worthy of Supreme Court attention. Pet. Br. 25.

Petitioner does *not* argue that the Ninth and Tenth Circuits applied conflicting or incompatible tests to answer the same federal question, which if true, may warrant this Court's attention. *McElroy v. United States,* 455 U.S. 642, 643 (1982). In fact, the Ninth and Tenth Circuits have

each adapted this Court's guidance in *Mt. Healthy* into very similar multi-factor tests to assess the applicability of Eleventh Amendment immunity.[3] *See Mitchell,* 861 F.2d at 201 and Pet. App. 5-6.

Instead, Petitioners move for certiorari because they claim the Ninth and Tenth Circuits do not pay equal deference to state court decisions regarding state law. Pet. Br. 28-29. They contrast the Tenth Circuit's wholesale adoption to the New Mexico Supreme Court's decision in *Daddow v. Carlsbad Mun. Sch. Dist.,* 898 P.2d 1235 (N.M. 1995) with the Ninth Circuit's analysis of the Arizona Supreme Court's decision in *Roosevelt Elementary Sch. Dist. Number 66 v. Bishop,* 877 P.2d 806 (Ariz. 1994).

1. Whereas, New Mexico's court of last resort has ruled specifically that Eleventh Amendment immunity does not apply to New Mexico schools, Arizona's court of last resort has never addressed whether Arizona schools are entitled to Eleventh Amendment immunity. In *Daddow,* the New Mexico Supreme Court squarely addressed a federal question: whether New Mexico school districts were arms of the state and possessed the shield of Eleventh Amendment immunity. The New Mexico Supreme Court applied this Court's guidance in *Mt. Healthy* to its evaluation of the state's educational funding system and decided that New Mexico law did not treat schools as arms of the state and, therefore, public schools were not entitled to immunity. *Daddow,* 898 P.2d at 1242. Two years later, in *Duke v. Grady Mun. Sch.,* the Tenth Circuit adopted the

[3] Compare the *Mitchell* factors to the Tenth Circuit's two factor test. The Tenth Circuit engages in two general inquires at n.2.

Daddow court's reasoning and held that New Mexico school districts do not have Eleventh Amendment immunity. 127 F.3d 972.

Unlike *Daddow,* the question in *Roosevelt* was exclusively a matter of state law: whether Arizona's mechanism for financing capital improvements for public schools violated the state constitution. 877 P.2d 806 (1994). The court held only that the state's method of funding capital improvements violated the General and Uniform Clause of the Arizona Constitution. *Id.* In reaching its decision, the Arizona Supreme Court *never* concluded, examined, or mentioned whether public schools were arms of the state. Thus, the Ninth Circuit made no error when it did not recognize *Roosevelt* to impart authority regarding Eleventh Amendment immunity.

2. An astute reading of Petitioner's cited case law reveals that the Tenth Circuit's treatment of *Daddow* is incomparable to the Ninth Circuit's treatment of *Roosevelt.* Petitioner takes the position that *Roosevelt's* narrow decision about a state constitutional law question is tantamount to answering a federal constitutional question about Eleventh Amendment immunity. However, *Roosevelt* cannot be authority for an issue it never addressed. Whereas the Tenth Circuit had specific guidance by a state court of last resort about how the state treated public schools for purposes of Eleventh Amendment immunity, no such guidance has been rendered by an Arizona court.

Moreover, the *Roosevelt* court supports the Ninth Circuit's decision that public schools are not arms of the state under Arizona law. The Arizona Supreme Court regarded school districts as mere "political subdivisions" of the state, writing:

> . . . local political subdivision can go above and beyond the statewide system [of financing capital improvements]. Disparities caused by local control do not run afoul of the state constitution because there is nothing in Art. XI [of the Arizona Constitution] that would prohibit a school district or a county from deciding for itself that it wants an educational system that is even better than the general and uniform system created by the state.

Id. at 814-815. Because, the Arizona Supreme Court does not hold school districts and counties to the same state constitutional obligations as the state, *Roosevelt* actually bolsters the Ninth Circuit's conclusion that public schools in Arizona are not arms of the state and, therefore, not immune from suit in federal courts. Pet. App. 20.

3. The Ninth Circuit's decision in *Belanger* does not warrant a grant of certiorari because it merely reflects that California law treats California schools differently than Arizona. Petitioner argues the Ninth Circuit decision in this case results in an anomaly in the circuit, because in *Belanger* it concluded that California school districts are arms of the state entitled to Eleventh Amendment immunity while Arizona school districts are separate political subdivisions not entitled to immunity. Pet. Br. 14-15. Petitioner implies an intra-circuit split. Intra-circuit splits do not generally warrant a grant of certiorari. Moreover, this decision does not create either an anomaly or intra-circuit split. In *Belanger*, the Ninth Circuit analyzed the *Mitchell* factors and distinguished the California school districts from the school districts presented in *Mt. Healthy*. The court found persuasive that in California, the state has uniquely assumed responsibility for and control over school funding. As a result, the court found local

California school districts are agents of the state itself. In California:

> [t]he state sets a revenue limit for each school district based on average attendance, subtracts property tax revenues from that limit, and allocates the balance to the school district from the state school fund. In short, the state determines the amount of money that school districts may spend per pupil and then provides the necessary state funds.

Belanger, 963 F.2d at 252.

By virtue of this revenue limit system, state and local revenue is commingled in a single fund under state control, and local tax revenue lost to a judgment must be supplanted by the interchangeable state funds already in the district budget. Thus, as the Ninth Circuit states, in California, any use of commingled funds is a use of state funds. The Ninth Circuit, however, is careful to point out that "[i]n the critical area of school funding . . . California has selected a different path from that of most states." *Id.* at 254. A comparison of *Belanger* and this case reveals how, in the application of consistent *Mitchell* factors, results may vary depending on how an entity is created by state law. A different conclusion following the analysis of how state laws treat Arizona and California schools, respectively, does not reveal an inter-circuit split or an anomaly within the Ninth Circuit. Instead, it suggests a working method of examining applicability of Eleventh Amendment immunity.

Moreover, since *Belanger*, the Ninth Circuit has also examined how state law treats Alaska school districts and Nevada school districts. The Ninth Circuit concluded that neither Alaska school districts nor Nevada school districts enjoy Eleventh Amendment immunity because they are not arms of the state and do not share the same controlling

characteristics as California. *Holz,* 347 F.3d at 1189 (Alaska); *Eason,* 303 F.3d at 1144 (Nevada). These decisions further support that California has taken a different path in its centralized control and funding of its schools than most states.

C. The Ninth Circuit's decision does not present a direct conflict with a decision of the Arizona Supreme Court. Petitioner feigns a conflict between this case and the Arizona Supreme Court's decision *Roosevelt* as applied to the first *Mitchell* factor – whether the state is legally and practically liable for a money judgment against the entity – and second factor – whether the entity performs a centralized government function. Pet. Br. 14, 19-21. There is no direct conflict because the Arizona Supreme Court has not addressed the federal question of whether an Arizona school district is entitled to Eleventh Amendment immunity. Rather, the state supreme court in *Roosevelt* addressed whether Arizona's then existing school finance system satisfied the general and uniform requirement of the education article in the state constitution. As part of its analysis the Arizona Supreme Court discussed the relationship between political subdivisions of local school districts and the state which the Ninth Circuit carefully considered.

With respect to the first factor, Petitioner argues that the Ninth Circuit improperly ignores *Roosevelt* and instead incorrectly relies upon several Arizona statutes which provide the mechanism by which liabilities that exceed the budget may be funded. *See* Ariz. Rev. Stat. 15-907.[4] Pet. Br. 22-25. However, the argument is unavailing

[4] Petitioner presents two conflicting views about the state of Arizona law regarding financing of public schools. Here, the Petitioner argues that Arizona has not sufficiently reformed its current public

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because after *Roosevelt,* Arizona altered its public school financing system to a system which now passes constitutional muster. In response to the *Roosevelt* case, the state legislature passed the 1998 version of Students First legislation. Subsequently, the Arizona Supreme Court issued an order declaring that the new law was facially valid and that there were no pending constitutional challenges to the public school financing statutes.[5] Unfortunately, Petitioners fail to note that it was this post-reform system that the Ninth Circuit examined to reach its conclusion in this case. Instead, Petitioner asks this Court to construe state statutes upon which the Ninth Circuit relied as unconstitutional when the Arizona Supreme Court has spoken clearly that the current public school financing system is constitutional. In light of the Supreme Court's declaration, Petitioners fail to point out any subsequent authority from the Arizona Supreme

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school financing system in Arizona to comply with *Roosevelt*. Petitioner also argues that certiorari should be granted because clarification is needed to give guidance about how to determine whether a school district is an arm of the state in a state that has undergone reform. Pet. Br. 7.

[5] *Roosevelt* led to the passage of a revised Students First legislation which was passed and later enacted in July, 1998. An earlier version of the Students First legislation passed in April, 1998, but was declared unconstitutional because it did not meet all of the standards set forth in *Hull v. Albrecht*, 190 Ariz. 34, 37, 960 P.2d 634, 637 (1998). After the state legislature passed the 1998 version and following a joint motion from the parties in *Roosevelt*, the Arizona Supreme Court issued an order declaring that the new law was facially valid and that there were no pending constitutional challenges to the public school financing statutes, and vacated all orders which had prohibited the distribution of funds to the public schools. Resp. App. 1-2.

Court to the contrary.[6] Certiorari is not justified for this reason as it is the primary responsibility of state courts of last resort to adjudge the validity of state statutes in light of state constitutions.

Regarding the second factor, Petitioner claims that *Roosevelt* requires the state be the preeminent governmental unit responsible for educating children and therefore, the Ninth Circuit erred in concluding that school districts do not perform central government functions. Pet. Br. 11-12. The Ninth Circuit attentively reviewed *Roosevelt* before rejecting Petitioner's argument. Specifically, the Ninth Circuit noted:

> *Roosevelt* was concerned with the state's constitutional responsibility to establish and maintain a 'general and uniform public school system,' a responsibility the Arizona Supreme Court determined the state had been shirking . . . Thus, the

[6] Petitioner cites *Tanque Verde Unified Sch. Dist. No. 13 of Pima County v. Bernini* for the proposition that any damages resulting from litigation must be funded by the state treasury and that a school district can not use other funds to pay such damages. 76 P.3d 874 (Ariz. Ct. App. 2003) Pet. Br. 24. The Arizona Court of Appeals does not rule so in its opinion. Rather, the Arizona Court of Appeals addressed a more narrow question: whether funds issued by the state facility funds board to a school district to acquire property for a new school could be used to pay any severance damages required in a condemnation action. The funds from the state facilities board are not the same funds used in the maintenance and operation budget. The Arizona Court of Appeals held only that a school district was not prohibited from using these funds issued by the state facilities board to pay for a severance damage necessary for acquiring a school site. *Tanque Verde*, 76 P.3d at 888. The court did not hold that schools were prohibited to using their own funds; nor did it issue any opinion about the use of funds under the maintenance and operation budget.

> Arizona Supreme Court concluded that while the legislature could delegate 'some of its authority to other political subdivisions of the state to help finance public education,' nothing in the constitution 'allows the state to delegate its responsibility under the constitution.' The *Roosevelt* decision led to the establishment of a capital financing scheme that provides state funds for improvements in school facilities. *Yet nothing in Roosevelt suggests that actually running the schools is a constitutionally-mandated state function.*

Pet. App. 20 (emphasis added).

The Ninth Circuit reached a reasoned conclusion that Arizona school districts actually run the local schools and provide education because of the slice of power granted it by statute and condoned by the Arizona Supreme Court. Pet. App. 14-17. The Ninth Circuit so concluded after citing numerous Arizona statutes granting local control to operate the schools[7]: "This system of delegation is more weighted towards localized control than the anomalous centralized California system described in *Belanger*." Pet. App. 16. Undoubtedly, Arizona has the authority to change how large of a slice of power it gives to local entities, such as local school districts and counties, to run the schools. Arizona may chose to reform a system so as to take the slice of power from political subdivisions and have a state-operated, centralized system of schools. However, that is not what Arizona chose to do when it reformed the system, as the Ninth Circuit recognized. Pet. App. 29.

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[7] For list of those statutes, *see* Resp. Br. 20-22.

Although Petitioners disagree with the Ninth Circuit's interpretation of *Roosevelt*, the Ninth Circuit reached a reasonable and permissible result about how state law treats school districts. The Ninth Circuit's interpretation of state laws of Arizona does not warrant a grant of certiorari. *The Wharf (Holdings) Ltd. v. United International Holdings Inc.*, 532 U.S. 588, 596 (2001) (declined to review whether Securities Exchange Act covered oral contract of sale where it may have been unenforceable under state law because a state law question); *also see Oklahoma Tax Comm'n v. Chicksaw Nation*, 515 U.S. 450, 461-62 (1995) (Court's practice is to accept a reasonable construction of state law by the court of appeals.)

D. This case does not present any important issue of federal law which has not been decided by this court. Petitioner asserts that certiorari should be granted because this Court's guidance is needed to determine whether an entity is an arm of the state for Eleventh Amendment immunity purposes when there has been school financing reform based on an enabling act and state constitutional provisions. Pet. Br. 7. Petitioner's reason does not warrant a grant of certiorari. There is no need for additional guidance simply because a state has undertaken school financing reform. Under established authority, this Court has instructed lower courts to examine how state law treats the entity in question. When there has been reform to the state's school financing system that affects one or more of the factors, then the court will examine the relevant amended state law as part of its analysis under this Court's established precedent including *Mt. Healthy, Hess, Lake Country Estates, Doe* and *Seminole Tribe*.

The Ninth Circuit's recent examination of whether an Alaska city school district was an arm of the state exemplifies how reform may affect a *Mitchell* factor. *Holz*, 347 F.3d at 1186-87. Until 1979, Alaska had a state-operated school system in which the state provided education and operated schools. *Holz*, 347 F.3d at 1186. In 1979, the state dismantled the state-operated system in favor of one in which local entities provided the education to students. *Holz*, 347 F.3d at 1186. Certainly, such a change would affect the multi-factor analysis of Eleventh Amendment immunity under established authority. However, the multi-factor test need not change to accommodate reform. Moreover, established authority about determining whether an entity is an arm of the state is flexible enough to evaluate very different entities. *See generally*, *Mt. Healthy* (school district); *Mitchell* (community college district); *Hess* (transportation authority); *Lake Country Estates* (regional planning agency). Consequently, additional guidance is not needed to evaluate one particular type of entity subjected to the multi-factor approach.

Here, when addressing the first *Mitchell* factor regarding whether the state was legally or practically liable for a judgment against GUHSD, the Ninth Circuit carefully considered the current financing system. Resp. Br. 13-14, n.5. The system the Ninth Circuit considered has passed state constitutional muster following the *Roosevelt* holding that the previous system was unconstitutional. Pet. App. 7-13.

Contrary to Petitioner's assertion, established precedent provides the needed guidance because reform itself does not alter the test for determining whether an entity is an arm of the state. However, reform may change how state law treats the entity in question with respect to the

factors considered in the analysis. Therefore, reform may affect the outcome of one or more of the *Mitchell* factors, depending upon the nature of, type and extent of reform to an entity.

II. Certiorari Is Not Warranted As The Ninth Circuit, Consistent With This Court's Precedents, Correctly Held That Petitioner GUHSD Is Not An Arm Of The State Shielded From Eleventh Amendment Immunity.

The Ninth Circuit correctly applied this Court's precedents in finding Petitioner GUHSD is a political subdivision of the State of Arizona rather than an arm of the State of Arizona. The Ninth Circuit did so by applying the *Mitchell* factors which are consistent with the decisions of this Court. In reaching its ruling, the Ninth Circuit considered the following.

A. The Ninth Circuit concluded that the state treasury was not vulnerable to a money judgment, finding the statutory scheme closer to Nevada's school districts than California's school system. Pet. App. 13. After a review of state statutes affecting funding of local school districts, the Ninth Circuit concluded that the maintenance and operation funds that would be used to pay a money judgment to Savage are not subject to state control, are not subject to a *Belanger-style* cap, and will not be replenished with money out of the state treasury. Pet. App. 12-13. *See also* Resp. App. 13-16. In doing so, the Ninth Circuit correctly rejected Petitioner's argument that the Arizona state treasury would supplant funds spent on a money judgment against GUHSD. The Ninth Circuit relied on the following statutory provisions contrasting

Arizona to California's funding system: Ariz. Rev. Stat. §§ 15-210; 15-971; 15-907; 15-905 and 15-481.

Notably, the Ninth Circuit found that Ariz. Rev. Stat. § 15-907 provides that "[i]n the event of excessive and unexpected legal expenses . . . the governing board of the school district may petition the county superintendent . . . requesting authority to incur liabilities in excess of the amount the governing board deems necessary." Pet. App. 13, n.3. Specifically, Ariz. Rev. Stat. § 15-907(E) provides that such excess shall not be included in the computation of state aid for education. Pet. App. 13, n.3; *see also* Resp. App. 15-16. Therefore, state dollars cannot supplant the additional amount authorized by the county superintendent. The amount of state equalization assistance would remain unchanged as a result of a local school district getting approval to exceed the budget. Under Ariz. Rev. Stat. § 15-907 school districts are not required to obtain a voter approval to increase the tax rate. However, school districts may also raise additional expenses to exceed their budget through a voter override. Pet. App. 13, n.3.

B. The Ninth Circuit found that Arizona school districts were not performing a central government function. Rather, school districts in Arizona provide for the public education within their boundaries and enjoy a substantial degree of autonomy under Arizona law. Pet. Br. 22. The Ninth Circuit, consistent with this Court, examined how state law treats school districts and found that numerous statutes give local school districts wide discretion to manage public schools. Pet. App. 13-17. The Ninth Circuit considered how Arizona law, like the law of most states, grants local school districts enormous autonomy in the management of public education, finding that Arizona school districts: (1) manage and control school

property in the district, Ariz. Rev. Stat. § 15-341(A)(4); (2) set curricula; Ariz. Rev. Stat. § 15-341(A)(6); (3) establish criteria for high school graduation; Ariz. Rev. Stat. § 15-701.01(B)(2); (4) select either a year-round or traditional school calendar; Ariz. Rev. Stat. § 15-341(A)(2); (5) construct school property, with voter approval; Ariz. Rev. Stat. § 15-341(a)(8); and (6) furnish, repair and insure school property; Ariz. Rev. Stat. § 15-341(A)(7). Pet. App. 14.

Despite that the Arizona Board of Education sets statewide standards – as do many states – it is the local school districts which have discretion whether to appoint an attendance officer, Ariz. Rev. Stat. § 15-804; and adopt their own policies regarding excuse of pupils from school attendance for religious purposes, Ariz. Rev. Stat. § 15-806. The provision for the expulsion of unruly students gives substantial discretion to the School Districts concerning whether or not to expel or readmit a student, whether to admit a student expelled by another educational institution, or whether to reassign a student to an alternative educational program. Ariz. Rev. Stat. § 15-841. Additionally, the state grants school districts power to "[p]rescribe and enforce policies and procedures for the governance of the schools" provided they are consistent with state law. Ariz. Rev. Stat. § 15-341(A)(1). Local districts can manage and control school property in the district, Ariz. Rev. Stat. § 15-341(A)(4); acquire books, supplies and furniture; Ariz. Rev. Stat. § 15-341(A)(5); make conveyances of school property, Ariz. Rev. Stat. § 15-341(A)(9); and prescribe curricula and criteria for promotion and graduation provided it meets state guidelines, Ariz. Rev. Stat. § 15-341(A)(6); and select textbooks and supplemental textbooks for common schools and high schools. Ariz. Rev. Stat. §§ 15-721 & 15-722.

Thus, Arizona's system is more heavily weighted towards localized control than the anomalous centralized California system described in *Belanger*. Pet. App. 15-16.

C. Regarding the third *Mitchell* factor, the Ninth Circuit held that Arizona school districts may sue or be sued in their own name because under Arizona law, Arizona school districts are explicitly granted the power to sue or be sued in their own name. Ariz. Rev. Stat. § 15-326(1). Pet. App. 22-23.

D. The Ninth Circuit also held that the fourth *Mitchell* factor weighed against Eleventh Amendment immunity because Arizona school districts are empowered by statute to "[h]old and convey property for the use and benefit of the district." Ariz. Rev. Stat. § 15-326(2). Additionally, they may furnish, repair and insure school property, Ariz. Rev. Stat. § 15-341(A)(7); make conveyances of district property in the name of the district, Ariz. Rev. Stat. § 15-341(A)(9); and purchase school sites with voter authorization, Ariz. Rev. Stat. § 15-341(A)(10). Pet. App. 23-24.

E. In the final *Mitchell* factor the Ninth Circuit relying upon the analysis in *Mt. Healthy,* held that the status of the school district also weighed against a shield of immunity because of how Arizona law treated school districts. Pet. App. 26. As did this Court in *Mt. Healthy*, the Ninth Circuit relied upon the definition of school districts as political subdivisions with geographic boundaries organized for the purpose of the administration, support, and maintenance of the public schools or an accommodation school. Ariz. Rev. Stat. § 15-101(20). Pet. App. 25-26. Consistent with *Mt. Healthy*, the Ninth Circuit noted the significance of the fact that the law's definitions

of "state" did not include "school district." *See* Ariz. Rev. Stat. §§ 12-348(I)(3); 12-820(7); 35-466(6); 38-842(26); 38-797(13).

Accordingly, because all five *Mitchell* factors indicate that Arizona schools are not agents of the state for Eleventh Amendment purposes, the Ninth Circuit correctly affirmed the district court's decision not to dismiss the complaint for lack of subject matter jurisdiction.

CONCLUSION

For the reasons set forth herein, the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF ARIZONA

GOVERNOR JANE DEE HULL,

Intervenor/Petitioner,

v.

HON. REBECCA A. ALBRECHT, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,

Respondent Judge,

and

ROOSEVELT ELEMENTARY SCHOOL DISTRICT NO. 66, et al.; LISA GRAHAM KEEGAN, Superintendent of Public Instruction; STATE BOARD OF EDUCATION; STATE OF ARIZONA,

Real Parties in Interest.

GILBERT UNIFIED SCHOOL DISTRICT NO. 41; MURPHY ELEMENTARY SCHOOL DISTRICT NO. 21; PHOENIX UNION HIGH SCHOOL DISTRICT NO. 320; JOHN J. HESTER; DUANE STANDAGE; WILLIAM EMORY GRIMES, KAREN C. MOORE; MADISON ELEMENTARY SCHOOL DISTRICT NO. 38; SCOTTSDALE UNIFIED SCHOOL DISTRICT NO. 48; PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1; PARADISE VALLEY UNIFIED SCHOOL DISTRICT NO. 69; PENDERGAST ELEMENTARY SCHOOL DISTRICT NO. 92,

Intervenors.

) Supreme Court
) No. CV-98-0238-SA
)
) Maricopa County
) No. CV 91-13087
)
) ORDER
)
) (Filed Jul. 20, 1998)

This matter came to the court as an original special action. After considering the written briefs and oral arguments of the parties, the court issued its written opinion on June 15, 1998.

The petitioner and real parties in interest have now filed a joint motion in which they agree that the school finance legislation signed into law by the petitioner on July 9, 1998 is facially valid and, therefore, that no constitutional challenges to the statutes remain pending.

It thus appears to the court, there being no constitutional questions before us, the matter is now moot.

NOW, THEREFORE, IT IS ORDERED vacating the 60-day time limit established by this court in its June 15, 1998 opinion within which the state was permitted to distribute funds to the public school system.

IT IS FURTHER ORDERED vacating any and all orders of the Maricopa County Superior Court prohibiting the state from distributing funds to the public school system.

IT IS FURTHER ORDERED that the respondent judge shall terminate Maricopa County Superior Court Cause No. CV-91-13087, after first disposing of ancillary tasks necessary to accomplish termination.

DATED this 20th day of July, 1998.

/s/ Thomas A. Zlaket
Thomas A. Zlaket, Chief Justice

Dena Rosen Epstein, State Bar #015421
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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Shelley Savage, Plaintiff, v. Glendale Union High School District No. 205 of Maricopa County, Defendant.	)	No. CIV 00-1546 PHX RCB **AFFIDAVIT OF CHARLOTTE D. BORCHER IN SUPPORT OF PLAINTIFF'S SUPPLEMENTAL RESPONSE TO GUHSD'S REPLY**
STATE OF ARIZONA COUNTY OF PIMA	)	ss.

I, Charlotte D. Borcher, being duly sworn, upon my oath state as follows:

PROFESSIONAL EXPERIENCE

1. I earned a Bachelors of Science in Education from the University of Akron in Akron, Ohio in 1967. In 1985, I also completed a Masters of Arts in Education Administration from Northern Arizona University. I am certified by the Arizona Department of Education to work in Secondary

Teaching, as a Kindergarten through 12th grade Principal and as a Superintendent.

2. I have worked for over 30 years in public education and the administration of public education in a variety of positions. I currently work as a school finance and administrative consultant to Arizona school districts and have worked in this capacity for more than 10 years. I have also worked for two Arizona school districts as an Assistant Superintendent and Business Manager for more than 9 years. For one and a half years, I served as Business Administrator and Assistant Superintendent for Business Services for Scottsdale Unified School District. Specifically, I was hired to correct irregularities in business and procurement functions under an Attorney General Consent Decree. I also was employed by the Arizona Department of Education for seven years in several positions, including the Director of School Finance and the Director of Teacher Certification. I was a consultant to the Arizona Senate when a number of reforms were being made to the public school financing system. I have had additional experience in public school education and administration of public schools which is detailed in my resume. (Attachment A).

3. In the various professional positions, my areas of responsibility or areas for which I have been consulted include, but are not limited to: business and financial operations, facilities construction and renovation, facilities maintenance, transportation, material services, technology services, demographics and enrollment projections and elections.

4. In both my experiences as a consultant and financial manager for school districts, I have prepared

budgets for school districts, been involved in the ongoing management of school districts' financial resources, prepared for and provided oversight to school districts in conducting bond elections related to funding of school districts' budgets.

AN OVERVIEW OF ARIZONA'S PUBLIC SCHOOL FINANCING SYSTEM

5. Local governing boards set the budgets for local school districts and oversee the administration of the districts' finances as they relate to maintenance and operation, including but not limited to: salaries, benefits, supplies, purchased services, such as legal fees and costs and all other expenses related to the general operation of a school district.

6. Under Arizona's public school financing system, the local school district, counties, state and federal government fund the education of Arizona's children.

7. All operational expenses except for new construction, necessary upgrades to physical facilities which fall below minimum state standards, and major repairs are financed under the following system.

8. To determine how much the state may provide in state funding to a school district, a calculation is done to determine how much a qualifying tax rate will generate in a district. The qualifying tax rate is set by the state. For example, $2.0647 per hundred of assessed valuation will be the qualifying tax rate used in the next fiscal year. The difference between the amount generated by the qualifying tax rate and what has been calculated to be the district's

budget limit is the amount of equalization assistance provided.

9. If a local school district's qualifying tax rate generates more than is needed to fund the budget limit, then the district receives no equalization assistance. If a local school district's qualifying tax rate generates less than is needed to fund the budget limit, then the district receives an amount of equalization assistance equal to the amount of deficit.

10. The state legislature sets a base support level amount which is a guaranteed amount for each student. The student count is derived from either the Average Daily Membership ("ADM") or an adjusted ADM. The district's ADM becomes the student count for next year's budget.

11. The original amount for the base support level for a student was set by the legislature in 1979-80. The base support level amount has been increased annually (although some years it has stayed at the same level). Additionally, a school district's base support level may be increased for specific factors that may exist in a school district. For example, a higher base support level is available to school districts for teacher compensation where there is a proper evaluation system in place or for districts that have career ladder programs for teachers.

12. The various student counts are then weighted. Every student in the student count is counted 1.0 times. However, students in kindergarten through grade 8 are counted at a weighted amount of 1.158; students in high school are counted at a weighted amount of 1.268; and disabling conditions result in additional and varying weights per student.

13. All these weights are multiplied by the various student counts. The total of the weighted student counts is then multiplied by the base level amount guaranteed for each student in the student count to yield the base level funding for the student count in that district.

14. Added to the base level amount guaranteed for the student count of a district are amounts for the transportation budget level, soft capital and unrestricted capital budget. The transportation budget level is an amount calculated based on the number of approved route miles and number of qualified students transported by the district. The soft capital and unrestricted budget levels are calculated by multiplying the student count by a specific dollar amount determined by the state.

15. Equalization assistance is made up of state and county funds.

16. The majority of school districts receive at least some equalization assistance from the county and state. Some local school districts, however, do not receive any equalization assistance and some unified local school districts do not receive equalization assistance for their elementary schools.

17. Local school districts may spend more than the limits set for the Base Support Level for education in their district if it can raise the additional funds through voter approved override elections. There are some restrictions on the amount that a district can seek in a voter override election. School districts can also spend more than the limits set for the Base Support Level, Transportation Control Limit and Capital Outlay Revenue Limit, for various reasons including but not limited to, the school district is under a desegregation order, has generated

funds by selling or leasing school facilities, has excess utilities costs, or qualifies as a small school district.

18. Local school districts do not maintain funds in their own accounts, except for student activity funds and auxilliary operation funds.

DUTIES OF COUNTY TREASURER RELATING TO SCHOOL DISTRICTS' MONIES

19. The County Treasurer for each county holds the funds for school districts situated within that County. The money raised from local taxpayers and the equalization funds provided by the county and state are maintained and administered by the County Treasurer. Some large districts, such as Tucson Unified School District and Glendale Union School District, are pilot districts which means that they may issue their own warrants through the County Treasurer and have the warrants paid similar to writing a check for a bank to honor. Other smaller districts which have not been approved as pilot districts issue vouchers electronically to the County School Superintendent for the county in which the district is situated. The County Superintendent is responsible for processing the voucher and ensuring that the payment is made.

20. Under A.R.S. §15.996.1, the county treasurer has two options in establishing and maintaining these monies. Option #1 allows for the establishment, maintenance, and reporting of a separate account for each district fund. Option #2 allows for the consolidation of certain funds into two major accounts.

21. Maricopa County Treasurer implemented Option #2 effective July 1, 1998.

22. During my professional experiences, I have not known of any instances when a State has attempted to withdraw equalization assistance once it has been sent to the County Treasurer, unless an error was found in the amount sent.

23. If all of a district's funds are not spent at the end of the fiscal year, the balance does not revert back to the state.

24. If a school district spends all of the cash in its Maintenance and Operation fund before the end of the fiscal year, the school district does not receive additional equalization assistance.

25. The federal government also provides funding for the education of Arizona's school age children. Financial assistance from the federal government is usually provided in the form of grants. Some of the grants are sent to the Arizona Department of Education which is responsible for dispersing them to the counties for use by the local school districts. Other federal grants are provided directly to the county treasurers for use by the school districts.

CAPITAL FINANCING OF FACILITIES

26. In 1994, the Arizona Supreme Court issued a ruling in *Roosevelt Elementary School District No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994) ("*Roosevelt*") that led to changes in the public school financing in Arizona.

27. Under Arizona's school financing system in effect prior to *Roosevelt*, local school districts provided the funding for capital improvements through school district bonded indebtedness, capital outlay overrides approved by

the voters, school plant funds generated from sale or long term lease of school property, and capital funding.

28. Because the tax base of a local school district is based on the property value of the property within its boundaries, disparities in the quality of facilities among local school districts developed. Some local school districts' facilities did not meet health and safety codes while others had indoor swimming pools, satellite dishes and elaborate computer systems.

29. The state legislature responded to the Arizona Supreme Court's decision in *Roosevelt* by creating a legislative package known as Students First. The Students First legislation creates separate funds to address the disparity in the quality of physical facilities among Arizona's local school districts. Those funds are the New School Facilities Fund, the Building Renewal Fund, and the Deficiencies Correction Fund.

30. The purpose of the Students First legislation is to create standards for ensuring the adequacy of the physical facilities among districts without precluding local school districts from exceeding these "adequate" standards.

31. The Deficiencies Correction Fund is a fund set up to correct the deficiencies that exist in the adequacy of the physical facilities of the school districts to raise the quality of physical facilities of all school districts to meet standards for adequate facilities. Approximately $1 billion dollars was set aside to fix the facilities in all school districts and is to be spent by June 30, 2003. The Deficiencies Correction Fund is administered by a state Facilities Board. Consultants were hired to identify deficiencies based on minimum and uniform standards. Deficiencies,

for example, might include revamping an air conditioner or replacing faulty wiring. Construction firms selected by the state Facilities Board work with the school districts to develop bids for the project. These selected firms assist during construction and approve finished work. Then the state Facilities Board sends the money to the county treasurer and the school district pays the bills. Once the deficiencies are corrected or by June 30, 2003, the Deficiencies Correction Fund will cease to exist.

32. Moneys raised from raising the sales tax when voters approved Proposition 301 were used to fund the initial cost of correcting the inadequacies in the facilities of school districts in Arizona. Moneys generated from the passage and implementation of Proposition 301 also provided additional moneys for education unrelated to correcting the inadequacies in physical facilities.

33. The Building Renewal Fund is a fund which is used for major repair and minor renovations to maintain the quality of the physical facilities of local school districts after the physical facilities have been brought up to adequate standards through the Deficiencies Correction Fund. The Building Renewal Fund is also administered by the Facilities Board. A formula is applied which is based on the size of the school district, the number and age of the schools in the school district, and previous renovations. Based on this formula, local school districts with more new buildings will receive more money than a local school district of similar size with older buildings. Each local school district receives its allocation which is placed with the County Treasurer to spend on building renewal and major infrastructure within the district. The Building Renewal Fund is an ongoing fund.

34. The New School Facilities Fund is a fund which is used to pay for new school construction in local school districts. A formula is used to determine how much will be paid per square foot to local school districts to fund a new school. A formula is applied which includes the number of students in the local school district multiplied by a per square foot allocation, depending on whether it is for an elementary or high school and other factors. The product is the amount of funding which will be paid to the County Treasurer to pay for the new construction. The New Construction Fund is also an ongoing fund.

35. After Students First legislative changes, local school districts still retain the right to fund school construction using capital outlay overrides with voter approval, school plant funds which are generated from sale or long term lease of school property, class "B" bonds with voter approval and unrestricted capital within caps and with voter approval. To date, some local school districts, such as Cave Creek and Paradise Valley, have contributed more funding than was provided from the New Construction Fund.

36. The Soft Capital Fund is a fund that is designed to provide funding that permits school districts to purchase short term capital items, such as textbooks, instructional aids, furniture and equipment, library books, buses, technology equipment and software. A formula is applied which provides a specific dollar amount per student. The Soft Capital Fund, however, is allocated as an amount that is added to the base level funding for the student count before calculating the district's amount of equalization assistance as outlined in ¶¶ 5-18.

37. School districts must use these funds for the purposes for which they were intended and not for other debts or expenses.

38. Public school financing in Arizona for all other areas of budgetary expenditures, other than those affected by the Students First funds, is handled as it was prior to *Roosevelt* except for modifications and adjustments made each legislative session, and as described in ¶¶ 26-37.

AUTONOMY OF SCHOOL DISTRICTS IN BUDGETING FOR SCHOOL FUNDS FOR LEGAL EXPENSES AND JUDGMENTS

39. Subject to the approval of their governing boards, local school districts develop their own budgets in accordance with the budget limits set forth in statute. These budgets cover the administration, maintenance and operation of the schools, including but not limited to salaries and employment-related expenses for teachers, support staff and facilities staff; maintenance and operation of the facilities in the school district; provision of educational services, such as educational materials, equipment and instructional staff; and provision of extracurricular sports and programs.

40. Local school districts have discretion in budgeting. Local school districts have a budget limit for Maintenance and Operation. Within that Maintenance and Operation limit, local school districts budget amounts for programs, such as regular education programs, special education programs, transportation, drop out prevention programs, desegregation activities and programs, and kindergarten through 3rd grade override spending.

41. Because the formula is based on "block funding," the district has the discretion to allocate funds to where they are most needed, as long as statutory services are provided. For example, if the formula for transportation totals $150,000 and the district is able to provide the transportation services for $125,000, then the district may allocate the difference to teacher salaries, or to supplies. With the exception of the drop out and K-3 budget override allocations which are restricted, a district can spend more or less on a particular program without any approval from the state department of education. Districts have the discretion to spend more or less of the allocation to an unrestricted program as long as the district does not exceed the Maintenance and Operation budget limit.

42. Most local school districts budget for professional services, with a specific coding for legal services. Legal expenses in a school district's budget may include attorneys' fees should the district choose to hire a private law firm to represent them in matters as well as the cost of judgments.

43. One common way for a local school district to decide how much to allocate to legal costs and expenses is to look at how much the school district has spent in past years.

INSURANCE FOR SCHOOL DISTRICTS

44. School districts also have the discretion to purchase liability insurance or to operate their own self-insurance fund. School districts may obtain insurance by joining the Arizona School Risk Retention Trust, Inc.

45. The Arizona School Risk Retention Trust, Inc. is an intergovernmental agreement between a group of local school districts.

46. The board of trustees of the Arizona School Risk Retention Trust, Inc. includes school administrators from local school districts which participate in the fund.

PAYMENT OF JUDGMENTS

47. If a local school district is faced with a legal judgment it may use insurance to the extent it will cover the judgment. If the insurance does not cover the legal judgment – or all of the legal judgment – the school district may pay the judgment from their budget. The school district can either apply the budgeted amount for legal costs and fees or from another appropriate program in the budget. For example, if a school district owed back pay to a teacher under a judgment, they could use funds for teacher salaries to pay the back pay award.

48. When a local school district does not have sufficient funding in its budget to pay the judgment, the school district may petition the county board of supervisors to allow the district to exceed its budget by that amount. That amount must be levied against the taxpayers in the subsequent fiscal year.

49. No equalization assistance from the state is provided to fund the amount of a legal judgment or attorneys' fees that exceeds a local school district's budget.

50. The local school district may not use any of the funds from the New School Facilities Fund, the Deficiencies Correction Fund, the Building Renewal Fund and the Soft Capital Funds to satisfy the judgment.

51. The County Board of Supervisors can approve that the school district can exceed the budget. Next fiscal year, if sufficient cash is not available, the school district will be responsible for raising the funds to reimburse the county from their property tax base during the next fiscal year.

52. During my professional experiences, I know of instances where school districts have been sued in their own capacities, faced monetary judgments and monetary fines that must be paid for in the manner outlined in ¶¶ 47-51. Monetary judgments have been for legal expenses, such as the attorneys' fees for defending claims, for the prevailing parties' attorneys' fees, for asbestos removal, for criminal fines for mishandling of funds, for back pay awards to staff in employment claims and for personal injury awards.

/s/ Charlotte D. Borcher
Charlotte D. Borcher

Subscribed and sworn to before me this 31 day of June, 2001.

/s/ David E. Polosky
Notary Public

Pima County, Arizona
My commission expires: 12-4-01